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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2006

CORAM :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Civil Miscellaneous Appeal No.50 of 2006

Commissioner of Central Excise,
Coimbatore. .. Appellant/Respondent

Versus

M/s.Flow Tech Power,
Coimbatore. .. Respondent/Appellant

Appeal filed under Section 35G of the Central Excise Act, 1944 against the order dated 03.03.2005 made in Final Order No.302 / 2005 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.R.Thirugnanam

JUDGMENT
(Judgment of the Court was delivered by P.P.S.Janarthana Raja, J.)

This Civil Miscellaneous Appeal is filed under Section 35G of the Central Excise Act, 1944 by the Revenue against the order dated 03.03.2005 made in Final Order No.302 / 2005 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, raising the following substantial questions of law.

> "1. Whether the Commissioner (Appeals) and the Tribunal have not committed an error of law in holding that the claim for refund is not barred by limitation since the duty was paid under protest when the respondent has not followed the procedures contemplated under Rule 233 B of the erstwhile Central Excise Rules, 1944.
>
> 2. Whether the Commissioner (Appeals) and the Tribunal have not committed an error of law in holding that the respondent is entitled for refund since there was no unjust enrichment merely

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relying upon the Certificate issued by the Chartered Accountant and the Profit and Loss Account submitted by the respondent?"

2. The facts leading to the above Appeal are as under:

i) The respondent assessee was engaged in the manufacture of components for Drip / Sprinkler Irrigation System falling under heading 84.24, and PVC/HDPE/LDPE/LLDPE pipes and tubes falling under heading 39.19 of the Central Excise Act. The respondent assessee cleared the goods without payment of duty claiming benefit of exemption under Notification No.46/94 dated 01.03.94 with the Commissioner of Central Excise. The Departmental Officers visited the factory on 08.03.1995 and found that PVC / HDPE / LDPE pipes manufactured by them were also cleared by them in the guise of parts of Drips / Sprinkler Irrigation System, on which they availed the benefit of the said notification claiming classification under Chapter Heading 84.24 of the erstwhile Central Excise Tariff Act, 1944. Therefore, an offence was registered against the assessee and after due process of law, the Commissioner of Central Excise passed an order vide Sl.No.136/96 dated 26.08.96 holding that the pipes removed from the factory could not be treated as an input for the network that was fabricated outside the factory, i.e. Drip / Sprinkler Irrigation System, as the pipe itself is an excisable product classifiable under Specific Heading 3917.00 of the erstwhile Central Excise Tariff Act, 1944 and are dutiable. So, the exemption under Notification Nos.46/94 and 52/95 are available only if the goods were classifiable under Chapter Heading 3917 of the erstwhile Central Excise Tariff Act, 1944. Hence, the Commissioner of Central Excise, confirmed the demand of duty of Rs.17,41,377/- and imposed a penalty of Rs.1,00,000/- and further allowed Modvat Credit admissible to them.

ii) The assessee filed an appeal against the Commissioner's order before the CEGAT, Chennai contending that the items in question manufactured were also classifiable under 84.24 and they had rightly granted exemption under the said notification and the said items were not Tubes and Pipes and other plastics for classification under Heading 3917.00. The Tribunal in its Order No.1262/2K dated 5.9.2000, allowed the appeal filed by the assessee. Consequent to the said order, the assessee filed a refund claim on 02.03.2001 for Rs.24,47,444/- by way of cash and Rs.71,70,360/- by way of credit in RG 23 A Part II Account on the ground that the CEGAT order held that the pipes used with other components in Drip / Sprinkler Irrigation System should be classified under 84.24 only and the parts of the system also under 84.24 and that they are paying duty under protest vide their letter No.1768/94-95 dated 14.3.95 which was duly

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acknowledged by the Department. Since there was difference in the working of duty amount claimed, the respondent vide their letter No.141 dated 05.12.2001, filed a Revised Refund Claim for an amount of Rs.25,58,795/- as PLA payment and Rs.64,72,809/- as RE 23 A part II payment. The respondent was issued with a Show Cause Notice dated 26.04.2002 asking them why the refund claim should not be rejected under Section 11 B of the Central Excise Act, 1944.

iii) After due process of law, the Assistant Commissioner, Coimbatore II Division vide Order No.207/2003 dated 21.08.2003 rejected the refund claim by holding that the letter of the protest was not filed under Rule 233B or the respondent did not follow the procedure under Rule 233B and in as much as they did not follow the procedure under 233B, their claim is time barred and rejected. The Adjudicating Authority rejected the refund claim as time bar only, but did not go into the other grounds mentioned regarding the unjust enrichment and captive consumption. Since the order was not speaking on the above aspect, the Assistant Commissioner, Coimbatore II Division filed an appeal for modification of the order in Order No.207/2003 under Section 35 E (2) of the Central Excise Act, 1944 which is pending before the Commissioner (Appeals), Coimbatore. Thus the question of unjust enrichment is yet to be decided by the Commissioner (Appeals), Coimbatore in the Appeal filed by the Department.

iv) Meanwhile, aggrieved by the rejection of refund order in Order No.207/2003 dated 21.08.2003 passed by the Assistant Commissioner of Central Excise, Coimbatore II Division, the respondent filed an appeal before the Commissioner (Appeals), Trichy, who allowed the respondent's appeal vide Order No.88/2004 dated 31.03.2004 by holding that the respondent is eligible for refund of duty paid as it was under protest. He further held that the respondent had discharged the burden of proving that the incidence of duty in respect of the impugned goods was not passed on to their customers. Aggrieved by the decision of Commissioner (Appeals), the appellant filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Chennai. The Customs, Excise and Service Tax Appellate Tribunal, by their Final Order No.302/2005 dated 03.03.2005 upheld the order of the Commissioner (Appeals), Trichy and held that the duty was paid under protest and hence question of time bar would not arise. The Customs, Excise and Service Tax Appellate Tribunal further held that duty burden had not been passed on to the customers and hence there was no unjust enrichment.

v). The learned counsel appearing for the Revenue submitted that the authorities below had failed to take into consideration that the respondent had not followed the procedure contemplated under Section 233B of the erstwhile Central Excise Rules, 1944 and hence, the assessee did not pay the duty under protest. Hence the claim by the

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assessee respondent for refund was clearly barred by limitation. Further it was submitted that the authorities below had merely relied upon the Certificate issued by the Chartered Accountant and the Profit and Loss Account filed by the assessee and they have not conducted any independent verification.

3. We heard the learned counsel in length. There was a factual finding by the authorities below that the duty had been paid under protest and the question of time bar would not arise. Hence, the argument that the petitioner paid the duty without protest is rejected. In respect of unjust enrichment, the facts reveal that the price was a composite one fixed by the Ministry of Agriculture. The factual position is that the duty had been absorbed by the assessee and it was submitted that the Chartered Accountant's Certificate dated 08.07.2002 and the profit and loss account, also confirm that the duty paid on the impugned goods had been absorbed by the assessee and had been shown as expenditure in profit and loss account and had not been passed on to the customer.

4. In the foregoing conclusions, we find no error in the order passed by the Customs, Excise and Service Tax Appellate Tribunal and requires no interference. Hence, no substantial questions of law arise for consideration of this Court. Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs.

km

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

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2. The Commissioner (Appeals II)
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3. The Assistant Commissioner,
O/o. The Assistant Commissioner of Central Excise
Coimbatore - II Division
1237, ELGI Buildings - Trihcy Road
Coimbatore - 18

+ one cc to Mr. R. Thirugnanam, SCCG, Advocate , sr no. 2552

MS(CO)
NM(16.03.2006)

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